IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 399.

ROBERT E. HANNEGAN, as Postmaster General of the United States,

Appellant,

—against—

ESQUIRE, INC.,

Appellee.

APPEAL FROM A JUDGMENT OF THE UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA.

BRIEF OF THE AUTHORS' LEAGUE OF AMERICA, INC., *AMICUS CURIAE.*

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Amicus Curiae,

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THE AUTHORS' LEAGUE OF AMERICA, INC., respectfully files this brief *amicus curiae* by stipulation of the parties. The Authors' League, organized in 1912, now encompasses in its membership almost all of the professional writers of America. It represents a total membership (exclusive of motion picture writers) of approximately 5500 authors.

The League is deeply concerned in the proceedings taken by the Postmaster General inasmuch as his construction of the second-class mail statute, if sustained, establishes him as the censor whom authors must satisfy in their writings intended for periodical publication. It is not the fortunes specifically of

Esquire Magazine which interest the League nor whether this or any other magazine is "mailable" within the terms of statutes which exclude objectionable matter from the mails, but the larger issue of the right of control over publications by the sole censorship of an appointed public official. This is intolerable in the American scene.

The authors of America must not be condemned to such restraint as is made possible by the original ruling below. To hold that a writer must mention nothing that might be noxious to the Postmaster General is to condemn him to falseness. Not so is literature developed.

All authors have an interest in the freedom of circulation through the mails of periodicals at the only practicable rate, since whether one writes in the form of drama, narrative or otherwise, there is a potentiality of periodical publication in serial or other form. The works of many of our foremost writers scientific, economic, political as well as fictional and *belles lettres* appear as much in periodical publications as in other form.

The Authors' League of America has ever been alert to intervene when censorship of literary material seemed indicated by administrative or legislative action. We are aware of no prior activity quite so portentous of evil as the effort in this case through Federal action to control the writings which the American public may read.

It was recently said:

> "The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other in-

strumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern." *Grosjean* v. *American Press Co.*, 297 U. S. 233, 250.

The position taken by the Postmaster General and judicially sanctioned by the District Court endangers the freedom of the press; this restraint, as was indicated in the *Grosjean* case, cannot be regarded otherwise than with concern.

In September 1943 the magazine Esquire was by written notice required to show cause why its mailing privileges should not be revoked upon the ground that nine (later amended to eleven) cited issues contained certain specified matter of an obscene, lewd, and lascivious character and "other matter of a similar or related nature"; and because of the inclusion of such obscene matter, the magazine had not fulfilled the qualifications for second-class mailing privileges since it was an unmailable publication. The proceedings were instituted, therefore, solely on the issue of obscenity.

Section 232 of the Postal Service Law (39 U. S. C.) provides that when a publication has once been accorded second-class mailing privileges, such shall not be revoked until a hearing has been granted to the parties. Esquire was granted a hearing not only on the charge of obscenity but also on a further charge, asserted for the first time in the course of the hearing, that even if not obscene, the magazine did not comply with the conditions of the second-class mailing statute. It would seem reasonable to infer that since upon

such hearing the accused periodical was acquitted on both counts, the second-class privilege would not be withdrawn. But no. The hearings terminated in a report and recommendation in which the majority of the Board held that the charges made were not supported in fact or in law and that the periodical was not obscene, fully complied with all conditions of the statute and was therefore entitled to retain its privileges.

Notwithstanding the report of the majority of his own Board which had heard the testimony of some forty-eight witnesses and examined over two hundred exhibits during a 17-day trial, the Postmaster General chose to hold, upon a completely novel theory and on his own administrative fiat that the magazine is not entitled to second-class privileges.

An analysis of the Postmaster General's order of December 30, 1943, indicates an absurd and inconsistent position. If a piece of mail is "non-mailable" within the language of the statute because of obscenity, it may not be carried or delivered at all by the Post Office. In his order, the Postmaster General stated that certain writings and pictures contained in the issues of Esquire, though admittedly not obscene, were nevertheless, in his opinion, vulgar, and that, therefore, all future issues are not to be permitted second-class mailing privileges (5587-5593)* In short, some of the material, it is said, is improper at second-class rates; at higher rates it is unobjectionable. When such writings and pictures, said the order, become a systematic feature, they should not be entitled to the cheaper rate of postage. This

* References in parentheses contained herein are, unless otherwise indicated to folios of the printed transcript.

would appear, therefore, to be not a question of morals but of money.

The Postmaster General's theory is that periodicals enjoying second-class privileges must establish themselves not only as strictly within the provisions of the statute granting such privileges but also within what he deems to have been the underlying though unexpressed purpose of Congress when it passed the statute in 1879.

The statutory provision called in question here is the Fourth condition appearing in section 226 of the Postal Service Law (39 U. S. C.), which is as follows:

> "It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers."

It will be remembered that the proceeding began with a citation charging the periodical with non-mailability under obscenity statute (35 Stat. 1129) and claiming it is not entitled to second-class privileges in that the issues contained non-mailable obscene matter. The hearing having gone against the Postmaster General, he changed his theory:

> "A publication to enjoy these unique mailing privileges and special preferences is bound to do more than refrain from disseminating material which is obscene or bordering on the obscene. *It is under a positive duty to contribute to the public good and the public welfare*" (5588).

The Postmaster General rules therefore that because of the presence of some material which he deems vulgar and risque (but not too much so), the magazine

does not establish itself as one "originated and published for the dissemination of information of a public character or devoted to literature," etc. The proceedings terminated therefore, not as they commenced with a charge of non-mailability on the ground of obscenity, but with a request for additional postage (if the magazine wishes to continue in business) because of the (to him) distasteful items appearing in the publication.

The vice of this proceeding from the standpoint of the Authors' League is that a single individual, a Postmaster General, endowed by his creator with no supernatural talents, undertakes to pass judgment on the literary and artistic value of matter appearing in the public press. No testimony in the record supports his determination since (1) the issue of "contribution to public good" was not introduced into the case until after the hearing board had found in favor of the magazine, and (2) *not a single one of the government witnesses had completely read a single issue of the magazine* and in most part they had read but a few pages or, in some instances only looked at a few pictures, which they testified were objectionable. Out of almost 2000 pages of material, but 90 items appearing on 86 pages were even complained of. Of these 90 items, 60 were approved as unobjectionable by one or more of the government witnesses. Of the 38 witnesses called by the publisher not one condemned any of the items as obscene or seriously objectionable although some witnesses frankly questioned the good taste of one or two items.

There seems to have been given in the District Court a judicial sanction to the power of censorship assumed by the Postmaster General.

Thus it was said:

> "May the Postmaster General, therefore, have not been warranted in his conclusion that the literature referred to was literature of desirable type of an educational value?" (p. 1969).

and again:

> "A cannibal of the South Seas has no conscientious scruples about catching, beheading and barbecuing, as it were, the child of his neighbor. There may be many contributing causes to the delinquency of youth, but may not the Postmaster General have reasonably had in mind that of literature as one? And did not the authors of the measure enacted by Congress have in mind good literature?" (p. 1969).

The Postmaster General thus had the court's approval of his free exercise of determination whether periodicals submitted to him contain "literature of desirable type of an educational value" and "good literature".

The District Court quoted from the order of the Postmaster General (p. 1964 Joint Appendix—Vol. 4) a statement to the effect that since the proceeding involves the use of second class mailing privileges, there is not involved the question of non-mailability as first, third or fourth class mail matter, nor the right of freedom of speech or of freedom of the press.

The constitutional objection to the action taken cannot be disposed of thus cavalierly as will be more fully discussed herein. The retention of the privileges under some other classification does not save the action from condemnation, if the appellant is entitled to second class privileges. *Lovell* v. *City of Griffin, Ga.*, 303 U. S. 444.

Said Judge Davidson:

> "There is a very decided difference between grouping and classification and that of censoring" (p. 1973).

If so, what is it? If the Postmaster, as censor, disapproves, he classifies a periodical out of existence. Is he any the less a censor for the circuitousness of his process?

McGuffy's Readers of the 1870's were suggested as the standard intended by Congress for the guidance of the Postmaster General. The Readers, it will be noted, were not assigned to the cheaper rates of the second class, but the higher rates of the third. There is nothing in the record or in history which establishes that Congress intended the second class rates to apply only to periodical publications which extol the homely virtues.

The District Court, it seems to us, failed to give proper consideration to the fact that the action here taken by the Postmaster General is in the nature of his personal amendment of the statute in circumstances where the Congress has, as a matter of record, refused to change it, and to give due thought to the constitutional invasion of the rights of the appellee.

POINT I.

If the Postmaster General's order of December 30, 1943 is sustained, he becomes established as a censor with "vague and absolute authority"* over the moral and literary value of newspapers and periodicals.

Under the Postmaster General's proposed procedure, he may distinguish between good literature (that which he deems to be for the public welfare) and bad literature (that which in his opinion fails to contribute to the public good); and to admit only the "better" at the lower rate. It is established by high and distinguished authority that this cannot be done. Indeed the office of the Attorney General of the United States has expressly condemned such practice.

The Attorney General, acting as counsel for the Postmaster in the case of *Houghton* v. *Payne*, 194 U. S. 88, stated in his brief to this Court:

> "In establishing the rate for 'newspapers and other periodical publications' *Congress was not seeking to discriminate between good literature and bad literature or to establish a censorship of the press with prizes for merit.* The thing it had in mind was not the goodness or badness of the information disseminated but the instrumentalities by which that dissemination might be accomplished. It was not thinking of the accumulated stores of 'solid or pure literature' in the vast libraries of the world, but it was thinking of how the mind of an enquiring and progressive

* This expression is taken from the opinion of Mr. Justice Brandeis in *U. S. ex rel. Milwaukee Social Democratic Publishing Co.* v. *Burleson*, 255 U. S. 407.

people might be kept abreast of the times in all departments of human thought and activity. Congress did not stand hesitating between a good and a bad newspaper." (Italics supplied.)

A Congressional Commission appointed in 1911, known as the Hughes Commission, filed its report on Feb. 2, 1912 with Congress. Mr. Justice Hughes, then an Associate Justice of this Court, headed the Commission. The question of second-class mailing privileges was the sole subject of the Commission's survey, investigation and findings. We may well assume that the investigation was painstaking and thorough and that any Commission which included, besides Justice Hughes, President Lowell of Harvard and Harry A. Wheeler, President of the Association of Commerce of the City of Chicago, would not have overlooked the feasibility of making distinctions among classes of periodicals enjoying second-class privileges if indeed such a solution were within the realm of possibility. The Commission's report was clear, honest and forthright. It recommended no tortuous distinction between one type of literature and another, but on the contrary, sweepingly set aside such possibility as a solution. Said the Committee:

"The low rate has helped to stimulate an enormous mass of periodicals, many of which are of little utility for the cause of popular education. Others are of excellent quality, but the experience of the post office has shown the impossibility of making a satisfactory test based upon literary or educational values. *To attempt to do so would be to set up a censorship of the press.* Of necessity the words of the statute 'devoted to literature, the sciences, arts, or some special in-

dustry"—must "have a broad interpretation." (Italics supplied.)*

The Commission said that the educational purpose had been accomplished only in part and that "it is wholly impractical to make a low rate for publications with a considerable educational value and a higher rate for the rest" (p. 95), and at page 96 of the report:

> "The commission is further of the opinion that it would be a mistake to discriminate between newspapers and magazines or other periodicals. *So far as educational value is concerned, no satisfactory distinction can be made.*" (Italics supplied.)**

The effort or attempt to regulate the reading and entertainment of the public has often been undertaken by self-appointed crusaders whose passion for authority was greater than that for liberty. No one will assert that Congress can establish a Board of Censors to whom writers and speakers must submit their material before publishing it; and no one will assert that obscene matter may be published with impunity; yet it is unthinkable that any one person should be per-

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* House Document No. 559, Postal Commission 1911-12, 62nd Congress, 2nd Session, "Report of Commission on Second-Class Matter", p. 142.

** The earlier Postal Commission of 1906-07 in their report on second class privileges spoke in much the same vein saying: "The prime defect in the statute is, then, that it defines not by qualities but by purposes, *and the purpose described is so broad as to include everything and exclude nothing.*

"*With the exception of a few instances where the publication has been excluded because the information was deemed not to be public, no periodical has ever been classified by the application of tests of this kind. Any attempt to apply them generally would simply end in a press censorship*" (pp. xxxvi-xxxvii). (Italics supplied.)

mitted to indulge a passion for authority by assuming the right to precensor public utterances.

In the course of the years, individuals and groups have made themselves obnoxious to their intelligent contemporaries and ridiculous to future generations by banning works which are established if not as classics, then as shining and brilliant pieces of literature, accepted as such by the test of time. The available list of such works is too large to repeat here, but among them are:

Homer's "Odyssey"; Cervantes' "Don Quixote"; La Fontaine's "Fables"; Defoe's "Robinson Crusoe"; Shakespeare's "Venus and Adonis"; Bizet's "Carmen"; Ibsen's "Ghosts"; Bronte's "Jane Eyre"; Zola's "Nana"; Hawthorne's "The Scarlet Letter"; Hardy's "Tess of the D'Urbervilles"; Cabell's "Jurgen"; Sherwood Anderson's "Many Marriages"; Browning's "Aurora Leigh"; Maeterlinck's "Mona Vanna"; Flaubert's "Madame Bovary"; Tolstoy's "Kreutzer Sonata"; Strauss's "Salome"; Shaw's "Man and Superman"; Gilbert and Sullivan's "Mikado".

Always those who condemn such work have minds rooted in the past. Morals are a question of custom, time and place. The crusading censors merely disagree with the mores of the day and will not tolerate that times and customs change. Perhaps in the nature of things and in the absence of a more inspired method there is no way but by a jury submission to pass on charges of illegal publications expressly excluded from the mails under criminal statutes, but there is and can be no question of the wholly abhorrent impropriety of permitting any person in his

own uncontrolled discretion to condemn and stifle a publication. However able and competent the Postmaster General is, what equipment has he or had his predecessors or will his successors in office have to look into the minds of the millions and to determine the effect which the reading of a given work will have, and then decide whether the effect is good or bad? The order of the Postmaster General when stripped of confusing verbiage is reduced to the simple proposition that he thinks the magazines are, though not really obscene, nevertheless nearly so and therefore not for the public good *at second-class rates.*

When confronted with the question of what is and what is not obscene, there is of course no easy answer. Judge Learned Hand in *United States* v. *Kennerley*, 209 Fed. 119, 121, venturing a definition later accepted by the Court of Appeals (*Parmalee* v. *United States*, 113 Fed. (2nd) 729) and by the 2nd Circuit (*United States* v. *Ulysses*, 72 Fed. (2nd) 705) said:

> "If there be no abstract definition, such as I have suggested, should not the word 'obscene' be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now? * * *
>
> "Nor is it an objection, I think, that such an interpretation gives to the words of the statute a varying meaning from time to time. Such words as these do not embalm the precise morals of an age or place; while they presuppose that some things will always be shocking to the public taste, the vague subject-matter is left to the gradual development of general notions about what is decent. * * *"

In an early English decision, *Regina* v. *Hicklin*, L. R. 3 Q. B. 360 (1868) it was said:

> "An obscene book is one which has the tendency to deprave and corrupt those whose minds were open to immoral influences and into whose hands the publication might fall."

But this old English doctrine was properly rejected by our courts and is not the law of our land, a fact largely unknown to, or intentionally disregarded by, the government witnesses upon the hearings herein. An enlightened age pays a greater respect to the advancement of literature and art and subordinates the shielding of the moronic mind to the public good. Thus Judge Learned Hand in *United States* v. *Levine*, 83 Fed. (2nd) 156, 157 said:

> "This earlier doctrine necessarily presupposed that the evil against which the statute is directed so much outweighs all interests of art, letters or science, that they must yield to the mere possibility that some prurient person may get a sensual gratification from reading or seeing what to most people is innocent and may be delightful or enlightening. No civilized community not fanatically puritanical would tolerate such an imposition, and we do not believe that the courts that have declared it, would ever have applied it consistently. * * *"

The Congress of 1879 which passed the act under which the Postmaster is proceeding did not undertake to the power he assumes. The act defines the periodicals which *shall* be entitled to the second-class privilege; another Congressional Act condemns, as unmailable, lewd and obscene material. The Postmaster General arrogates unto himself the right to

create a hybrid publication not condemned by Congress as non-mailable and not excluded by the Statute setting forth conditions for enjoyment of the second-class privilege. He creates a new category of mail matter, namely, a "nearly obscene non-second-class periodical" and says in substance this periodical has a bad moral effect if mailed at second-class rates but not if mailed as merchandise at a higher rate. Indeed non-mailable matter is not defined by any separate statute at all; certain material is declared non-mailable in the same statutes which makes mailing of such matter a criminal offense. For example, it is a criminal offense to send obscene literature through the mail and thereby the material becomes non-mailable.

Now it is said that a periodical which lends itself to a certain type of humor, art and story (not obscene), should be denied its second-class rate (the rate which Congress has said periodicals *shall* enjoy) because in the Postmaster General's view it is "not being originated and published for the dissemination of information of a public character, or devoted to literature, * * *" (5572). In other words because of the inclusion of some material, less than five percent, which the Postmaster says is "non-public good" literature and art, the magazine cannot be found to be originated and published for the dissemination of information of a public character or devoted to literature, etc.

A perfectly mailable, non-obscene periodical* thus becomes merchandise not entitled to be mailed as a periodical merely because some very small part of its

* Upon the pre-trial proceedings in the District Court, counsel for the Postmaster General stipulated that the Postmaster General does not defend this action on the grounds either (1) that Esquire is obscene within the provisions of 18 U. S. C. 334; or (2) that it is non-mailable under that or any other statute.

content does not measure up to the Postmaster General's personal standards of what contributes "to the public good and the public welfare."

That the periodical Esquire enjoys a high degree of literary standing is established in the record on file. It commands sufficient respect among leaders of the literary world to have merited contributions by such writers as, among others, Theodore Dreiser, John Dos Passos, Lord Dunsany, Lion Feuchtwanger, Ernest Hemingway, F. Scott Fitzgerald, Maxim Gorky, D. H. Lawrence, Maurice Macterlinck, Thomas Mann, Andre Maurois, Franz Molnar, Luigi Pirandello, Jacob Wassermann, Thomas Wolfe and Arnold Zweig; and art by George Bellows, Thomas Benton, Alexander Brook, James Chapin, Salvador Dali, William J. Glackens, Rockwell Kent, George Luks, Reginald March, Henry Varnum Poor, Diego Rivera, John Sloan and Eugene Speicher.

A tabulation of the text features of 11 issues shows 85 articles on subjects of current interest, of which 62 concern the war effort; 59 short articles on a variety of subjects; 73 fiction shorts; 57 sports articles or stories; 22 articles on personalities; 24 war action paintings; 11 colored photographs of dogs and birds; 11 sets of paintings, prints and drawings from well-known galleries; 27 colored photographs of motion picture personalities; 14 colored photographs of stage performers; 27 paintings and drawings with fashion treatment; and 23 paintings of the "Varga girl".

There was an analysis of ten issues of the magazine testified to by Lloyd H. Hall, head of the Editorial Analysis Bureau. The Bureau classifies, primarily for the information of national advertisers, the editorial material contained in some thirty of the leading magazines of the country (3057-8). He found 11

of the editorial content devoted to fiction, 27% to matters of general interest, approximately 9% to matters of cultural interest, approximately 8% to wearing apparel and accessories, almost 3% to travel and transportation, 10% to sports, 2½% to food, 7% to amusement, 4% to foreign and international affairs, 4½% to national affairs. Mr. Reeves Lowenthal, President of the Associated American Artists, concluded that each of the eleven issues had substantial art content of high value. Mr. Henry L. Mencken, an author and director of the Baltimore Sun, testified as to the high literary merit of the magazine and reputation of the authors. Mr. William Jacobs, President of the Presbyterian College of South Carolina, thought the periodical had contributed constructively toward the encouragement of clean sports. Dr. Fred S. Siebert, Director of the School of Journalism of the University of Illinois, said the magazine is made up largely, if not chiefly, of information of a public character. Dr. Eachs, Pastor of the Ohio University Presbyterian Church, testified as to the excellence of some of the material which the Government witnesses condemned and as to the magazine's compliance with the requirements of the statute. Mr. Louis J. Croteau, Executive Officer and Secretary of the New England Watch and Ward Society, an organization which Mr. Croteau describes as being sometimes referred to as the outstanding censorship organization in the country, and which examines each year about eight hundred to nine hundred different issues of magazines, declared that Esquire had been examined as part of the functions of his organization and that the magazine was never condemned or declared to be obscene with respect to any part of any one of the issues under examination.

nor had the Watch and Ward Society ever received a complaint against Esquire. Other noted persons who gave the magazine a clean bill of health before the Board included: Dr. William Allen Neilson, President Emeritus of Smith College, Associate Editor of the Harvard Classics and Editor-in-Chief of Webster's New International Dictionary; Major John L. Griffith, Athletic Commissioner of the "Big Ten"; Miss Mary Ellen Chase, Professor of English Literature at Smith College; George Jean Nathan, outstanding author, editor and dramatic critic; Felix M. Morley, President of Haverford College, Haverford, Pa.; J. Halsey Gulick, Headmaster of Proctor Academy, Andover, New Hampshire; Miss Marjorie Hope Nicolson, former Dean of Smith College; Drs. Kenneth J. Tillotson and Clements C. Fry, psychiatrists and advisers to the student health department of Harvard and Yale Universities, respectively; Miss Josephine Mixer Gleason, Associate Professor of Psychology at Vassar College; Dr. Hedley S. Dimock, Dean of George Williams (Y. M. C. A.) College; and Dr. Aaron Eisenman, Chaplain of the Florence Crittenton League.

The impropriety of condemning a work because some selected content is deemed objectionable by a censor, has often been pointed out in obscenity cases.

In *United States* v. *One Book Entitled "Ulysses"*, 72 Fed. 2d. 705, 707, Judge Augustus N. Hand said:

> "The question in each case is whether a publication *taken as a whole* has a libidinous effect."

and again:

> "'No work may be judged from a selection of such paragraphs alone. Printed by themselves they might, as a matter of law, come within the prohibition of the statute. So might a similar

> selection from Aristophanes, or Chaucer, or Boccaccio, or even from the Bible. The book, however, must be considered broadly as a whole.' We think Judge Andrews was clearly right and that the effect of the book as a whole is the test."

Judge Hand was quoting from an opinion of Judge Andrews in the New York Court of Appeals in the case of *Halsey v. New York Society for the Suppression of Vice*, 234 N. Y. 1.

At page 708 in the "*Ulysses*" case, Judge Hand said:

> "The foolish judgments of Lord Elden about one hundred years ago, proscribing the works of Byron and Southey and the finding by the jury under a charge by Lord Denman that the publication of Shelley's 'Queen Mab' was an indictable offense are a warning to all who have to determine the limits of the field within which authors may exercise themselves."

And so the sensibilities of the Postmaster General must not be permitted to prevail; to him was not delegated the power to change public standards of right or wrong in literature.

If the appellant's procedure receives this Court's sanction, there is danger to the authors of America that they must conform their writings to the standard of morals not of the day or of the enlightened public, but of an appointed official. To prevent this retrogression to another age, we appeal to the Court for a condemnation of the Postmaster General's order.

The government argued that the words "information of a public character" have a broader significance and it was said that the words "public good", "efficient educators" and "useful knowledge" should

somehow be read into the statute and that the Postmaster General must be allowed to determine whether or not the magazine is so designed (5294-5297, 5318). But Congress did not say so, and when, at least twice, Congressional Commissions were set up to look into the matter and advise Congress, no change in this regard was even intimated; indeed since the enactment of the law in 1879 not a word of the law in question was changed in so far as concerns the type of public information, literature, art or science required under the Fourth condition.

When one of appellant's predecessors in the past tried to add conditions to this same statute and to read into the statute provisions not contained therein, the Court of Appeals declared such procedure invalid and said:

> "By Act of Congress, March 3, 1879 C 180, 20 Stat. 355, Congress has not committed to the Postmaster the matter of determining what should be carried in the mails as second class matter and what as matter of third class, but has reserved to itself that power exclusively, itself making the classification; and it is not competent for the Postmaster General to add anything to the statute or take anything away from it."

Payne v. *U. S. ex rel., National Railway Publishing Co.*, 20 App. D. C. 581; followed in *Payne* v. *U. S. ex rel. Railway List Co.*, 20 App. D. C. 601, and certiorari dismissed on motion of Postmaster General (1904), *Payne* v. *U. S. ex rel., National Railway Publishing Co.*, 192 U. S. 602.

Who shall judge whether or not a given publication is "devoted to literature?" The word "literature" has

been variously defined. George E. Woodberry in the "The Appreciation of Literature" defines it thus:

> "Literature is an art of expression. The material which it employs is experience; or, in other words, literature is the expression of life."

And Cardinal Newman (The Idea of a University) said:

> "By Letters or Literature is meant the expression of thought in language, where by 'thought' I mean the ideas, feelings, views, reasonings and other operations of the human mind."

It is significant that the Congressional Postal Commission of 1906 in considering the question had less difficulty than the Postmaster General in finding an answer. On page xxxvi of its report (Report of Postal Commission, 1906; Govt. Printing Office 1907) it said:

> "There is practically no form of expression of the human mind that can not be brought within the scope of 'public information', 'literature, the sciences, art, or some special industry'. It would have been just as effective and just as reasonable for the statute to have said, 'devoted to the interests of humanity', or 'devoted to the development of civilization', or 'devoted to human intellectual activity'.
>
> "The prime defect in the statute is, then, that it defines not by qualities but by purposes, and the purpose described is so broad as to include everything and exclude nothing."

Congress received this report and remained satisfied with the statute although advised by its Commission of such broad scope of the language. The Postmaster General assumes an amendment to the statute

by which the meaning, accepted for almost seventy years, is modified to include an additional condition, namely, that *all* of the content of the magazine must be devoted to literature, the sciences or arts and it must contain nothing which offends the sensibilities of the current incumbent. These things are insidious. If now we allow that he may determine the magazine to be non-mailable as second-class because some of the articles and pictures are in his opinion not for the public good, we will open the door to his free appraisal of the material for other qualities which will be alleged to be undesirable. Suppose a magazine prints articles or stories held by him to be so lacking in merit, so wholly uninspired as to be of no "public good"; or so pointless as to be of no service or value to any reader; why may he not say that this also is not what was intended by Congress and the periodical should not be granted the second-class rate? Or, may he not go so far as to rule out periodicals that attack the administration then in office as "not for the public good and welfare"?

No survey has ever been made so far as we know, psychological or otherwise, as to the effect upon the reader of matter claimed to be objectionable. Apparently the Government knows of none. Perhaps it is impossible. It is accepted that the test for obscenity is whether the matter offends the mores of the times. But is there a standard by which this test may be applied? A large scale poll or survey by experts might possibly indicate something. It hardly would be in the category of substantial proof. Such polls introduced in the present case vindicated the publication completely. The blustering assertions of the present appellant, however, do not go for proof. And above all, no man in the land has either the personal equipment or the public's authority to pass judgment.

POINT II.

The Postmaster General's order is a denial of the freedom of the press and a deprivation of rights without due process of law; it is a usurpation of the powers of Congress.

If the deprivation of the right to publish a given periodical is unconstitutional, the refusal to it of the second class mailing privilege is equally so. Both Mr. Justice Brandeis and Mr. Justice Holmes stated that the right to the use of the mails is a part of free press and that the withdrawal of second class postal rights would deprive many publishers of their property without due process of law. (*U. S. ex rel. Milwaukee Social Democratic Publishing Co.* v. *Burleson*, 255 U. S. 407, 430.) These things were said in the dissenting opinion in a case where the action of the Postmaster General was upheld by the majority on the ground that the exclusion of the newspaper was justified because unmailable under a war time measure, *i. e.*, the Espionage Act.

The use of the postal service has been held to be a property right. (*Hoover* v. *McChesney*, 81 Fed. 472.) Calhoun in Congress in 1835 said:

> "The object of publishing is circulation; and to prohibit circulation is, in effect to prohibit publication * * * and the prohibition of one may as effectually suppress such communication as the prohibition of the other and of course would effectually interfere with the freedom of the press and be equally unconstitutional."

In the recent case of *Lovell* v. *City of Griffin, Ga.*, 303 U. S. 444, a statute which prohibited distribution of

literature within the city limits was held invalid despite the fact that obviously other forms of circulation were free to the publishers.

Freedom of publication includes freedom of circulation and an unjustified restriction or limitation upon freedom of circulation is unconstitutional. It is therefore not so, as is contended by the Postmaster General, that freedom of speech or freedom of press is not involved because the work is admitted as First, Third or Fourth Class Matter (R. 1878 Joint Appendix, Vol. 4).

It is common knowledge that the deprivation of Second Class mailing privileges is tantamount to a denial of any mailing privileges in respect to most of the periodicals now circulating, because of the excessive additional financial burden which would be imposed. The imposition of such burden, as the imposition of the tax in *Grosjean v. American Press Co., infra*, abridges the freedom of the press. The difference in the instant case is conceded to be over a half million dollars a year.

The refusal of second class mailing privilege is, for purposes of testing the constitutionality of the process, a refusal of the right of publication.

It is already established that before there can be denial of the right of speech or press guaranteed in the First and Fourteenth Amendments of the Federal Constitution, there must appear to be a clear and present danger that the words which are to be prohibited will bring about the substantive evils that Congress has the right to prevent. (*Schenck v. United States*, 297 U. S. 47.)

In *Bridges v. California*, 314 U. S. 252, the Court said (p. 262) that the "clear and present danger"

language of the *Schenck* case has afforded a practical guidance in a great variety of cases in which the scope of constitutional protection of freedom of expression was an issue. It has been utilized in passing on the constitutionality of convictions under the Espionage Act, *Schenck v. U. S.*, *supra*; under a Criminal Syndicalism Act, *Whitney v. California*, 274 U. S. 357; under an Anti-Insurrection Act, *Herndon v. Lowry*, 301 U. S. 242; and for breach of peace at common law, *Cantwell v. Connecticut*, 310 U. S. 296.

Since it is required to establish "clear and present danger" before the press may be restricted, even in statutes aimed at such potential harm to public welfare as Criminal Syndicalism and Insurrection, it is inconceivable that this guiding principle shall be ignored in the Postmaster General's "quasi objectionable" periodical.

In the *Bridges* case (p. 262) it was said:

> "Moreover the likelihood, however great, that a substantive evil will result, cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be 'substantive'. Brandeis, J., concurring in *Whitney v. California*, *supra*, 274 U. S. at page 374, 47 S. Ct. at page 647, 71 L. Ed. 1095; it must be 'serious', Id., 274 U. S. at page 376, 47 S. Ct. at page 648, 71 L. Ed. 1095. And even the expression of 'legislative preferences or beliefs' cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression. *Schneider v. State*, 308 U. S. 147, 161, 60 S. Ct. 146, 151, 84 L. Ed. 155."

This Court said further that what finally emerges from the "clear and present danger" rule is a work-

ing principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished (p. 263). And again, at page 263:

> "Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally.
>
> "It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."

Now this guiding principle indicates the vice of what has been done here. The right to further use of this very substantial form of distribution is denied not because it is manifest that a clear and present danger that a substantive and serious evil will result, but because the appointed official does not deem the contents of the condemned periodical to be for the public good.

Nor is it of any importance in the constitutional aspect of the case, whether or not a periodical is less than what one may fairly call "good literature". It is of grave importance to consider what might be done if this process receives final judicial sanction.

Mr. Justice Murphy said, in *Thornhill v. State of Ala.*, 310 U. S. 88, at page 97:

> "Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting

to license the dissemination of ideas. *Schneider v. State*, 308 U. S. 147, 162-165, 60 S. Ct. 146, 151-152, 84 L. Ed. 155; *Hague v. C. I. O.*, 307 U. S. 496, 516, 59 S. Ct. 954, 964, 83 L. Ed. 1423; *Lovell v. Griffin*, 303 U. S. 444, 451, 58 S. Ct. 666, 668, 82 L. Ed. 949."

and again:

"It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. See *Near v. Minnesota*, 283 U. S. 697, 51 S. Ct. 625, 630, 75 L. Ed. 1357. One who might have had a license for the asking may therefore call into question the whole scheme of licensing when he is prosecuted for failure to procure it. *Lovell v. Griffin*, 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949; *Hague v. C. I. O.*, 307 U. S. 496, 59 S. Ct. 954, 83 L. Ed. 1423. A like threat is inherent in a penal statute, like that in question here, which does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press."

The Court said further that the existence of a statute which lends itself to harsh and discriminatory enforcement by prosecuting officials results in restraint on all freedom of discussion. And so here an interpretation of the powers of the Postmaster General which would enable him to indulge in discriminatory enforcement would likewise be a restraint on freedom of the press.

Again, in the *Thornhill* case, at page 98:

"Where regulations of the liberty of free discussion are concerned, there are special reasons for

observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression. *Stromberg* v. *California*, 283 U. S. 359, 368, 51 S. Ct. 532, 535, 75 L. Ed. 1117, 73 A. L. R. 1484; *Schneider* v. *State*, 308 U. S. 147, 155, 162, 163, 60 S. Ct. 146, 151, 84 L. Ed. 155. Compare *Lanzetta* v. *New Jersey*, 306 U. S. 451, 59 S. Ct. 618, 83 L. Ed. 888."

We may alternately consider the Postmaster General's act either an attempt to exercise police power over publications with whose editorial content he is in disagreement, or an effort to increase the revenue of the Post Office Department. In either case his approach is not a legal one. If there is to be an increase of the rates or a reclassification it must be done by Congress. If there is to be an extension of the obscenity laws it must be by legislative action; but beyond everything, there must not be, now or ever, a single official empowered to censor the written or spoken word for any purpose or in any guise.

POINT III.

The legislative, administrative and judicial history of the postal law and its enforcement establishes that it is not now within the province of the Court to reinterpret it.

The history of the statute briefly is this: The first act for special rates for newspapers was passed in 1792 (1 Stat. 328). Magazines were added in 1794 (1 Stat. 362). In 1825 magazine rates were adjusted and again in 1827. There were various changes in

rates between 1845 and 1879. In 1863 for the first time mailable matter was divided into classes, the second of which was "regular printed matter" which included all mailable matter exclusively in print issued at stated periods. The present classification of mail matter was enacted in 1879. Rates were changed in 1884 and again in 1885 and in 1894 the definition of publications was enlarged to include those of certain associations. However, never in the history of the department from the outset was any distinction made between respective types of literature, good, bad or indifferent.

Mr. Edwin C. Madden, then Assistant Postmaster General, in his remarks to the Postal Commission of 1906 said:

> "What does the law mean by 'devoted to literature'? If we were to hold that the term 'devoted to literature' means that the publication shall be devoted to the subject of literature, and not merely to contain literature itself, imagine the result. A great number of our best magazines would be subject to exclusion. Nevertheless that is exactly the construction that is placed upon the other three provisions, namely, the sciences, arts or some other special industry. One devoted to the sciences discusses medicine, for instance, one devoted to the arts discusses music, etc., and one devoted to some special industry discusses matters relating to that industry. One supposed to be devoted to literature is admitted to this class upon its containing literature itself without any discussion on the subject at all."

Mr. Madden said that if the head of a department finds administrative difficulties, he should endeavor

to have the defects removed and that it was in this spirit that the department had asked for the creation of a commission to look into the whole subject. This, it will be noted, was the Congressional Committee which ultimately reported to Congress and based upon its report, Congress concluded that no change should be made in the statutory enactment (Hearings before Postal Commission of 1906, p. 29). But the Postmaster General, by the presently adopted procedure, asks the Court by judicial interpretation to do what Congress apparently has declined to do. The Commission of 1906 concluded in its report (Government Printing Office 1907) that every form of expression of the human mind comes within the scope of public information, literature, the sciences, art, etc., and that any attempt to apply qualitative tests generally would end in a press censorship. Mr. Madden suggested to Congress that the element of currency in a magazine as an essential characteristic be spelled out by amendment of the Statute. He said:

> "The requirement of currency is something that can be enforced administratively. While the Post-Office cannot really determine whether the matter is literature or not, without the necessity of becoming a censor of its quality, it can determine with ease whether or not it is current."

Chairman Madden had six suggestions for a proposed new Bill. The only new idea advanced was that the periodical should be originated and published for the dissemination of *current* public information or the presentation, discussion or treatment of *current* topics in relation to the sciences, arts or some special industry and must not consist wholly or substantially of fiction. Congress adopted none of

the suggestions except a proposal that a Postal Commission be appointed. Thereupon the Commission known as the Hughes Commission, heretofore referred to, was appointed. The Hughes Commission, as already appears, found it impossible to make a satisfactory test based upon literary or educational value and declared any such attempt would be a censorship of the press. The Commission felt that under these circumstances the solution would be an increase in charge for second-class mail in order that a more equitable adjustment would be made.

There was no intimation that the law was being violated by the admission of any periodicals not of a given standard of literary merit, or containing in part material of questionable public good.

It is apparent, therefore, that Congress is completely advised of conditions existing in the field of second-class mail matter. It has from time to time made such changes and modifications as it thought appropriate. It has drawn a sharp line against obscenity by providing for the criminal prosecution of those who send such material through the mail and declared the material itself to be non-mailable. It has never seen fit to say that the second-class privilege is to be withdrawn from magazines which, in the Postmaster General's opinion, contain matter which is, in some small part, vulgar or in bad taste.

After the report of the Hughes Commission was filed there was a meeting before the House Committee on Post Offices and Post Roads on February 9th and 10th, 1914. The Chairman said he thought there ought to be a short hearing in connection with the hearings already held on the subject, and the report of the Hughes Commission on the question "so that we can understand better what ought to be done".

In all this there was not one word of reclassification. In this connection Postmaster Burleson wrote to Mr. Jonathan Bernie, Jr., Chairman of the Joint Committee, on January 13th, 1914, recommending an increase from one to two cents per pound.

In 1898 there was before the House of Representatives the so-called Loud Bill (HR 5359), whose intended purpose was to force out of the second-class mailing privileges certain publications. Mr. Jeremiah D. Botkin, opposing it (March 3rd, 1898), spoke of "low grade literature in the form of cheap papers, etc." The Loud Bill never became law.

The Congressional intent was indicated by the brief of the Attorney General filed on March 7th, 1904 (heretofore referred to), in the case of *Houghton* v. *Payne*, 194 U. S. 88; where he said:

> "*We confidently submit that what Congress consistently had in mind in the creating of this privileged class of publications was the universally recognized, commonly accepted and perfectly well understood periodical of every day speech.* All argument based upon the value and high standing of the Riverside Literature Series is wholly beside the mark.
>
> "As we have already attempted to show, by the same token which admits them, all other books good, bad and indifferent, may be admitted. The Postmaster General would have no more right to admit the Riverside Series of Literature on account of its literary value than he would have the right to exclude these publications on the ground of want of literary value." (Italics supplied.)

For sixty-seven years the second-class mailing privilege has been accorded periodicals on the basis of

their adherence to the conditions outlined in Section 226 of the Postal Service Law (39 U. S. C.). Never in the history of the Law and its administration so far as Post Office Department witnesses could recall, has it ever been contended that mailable material may not be forwarded under second-class privileges because the Postmaster General considered its content not of sufficiently high merit to justify the privilege. This may sound baldly stated, but there can be no doubt that it fairly represents the Postmaster General's action. He said in his order that the magazine is not being published for the dissemination of information of a public character, nor has it been devoted to literature, etc., within the meaning of the section, in that it has included as a policy, a few items allegedly skirting close to the edge of obscenity. We do not believe we are misstating the case, therefore, in saying that he has denied the second-class privilege because he considered some of the contents of the magazine not unlawful, but distasteful to him. Note that the Board appointed by him did not find them either unlawful or distasteful.

The absurdity to which the contended interpretation would lead is manifest. It is as though the Court were asked to add to the statute the words "if the publication contains matter not obscene, but nearly so, it may be mailed only under the first, third or fourth class, and the Postmaster General shall have the sole right to pass judgment on the material". The prospect is staggering.

It is settled that statutes long interpreted in a given way and more particularly statutes so administered by those charged with executive duties, are to be interpreted in accordance with established construction. So the Circuit Court in *United States* v.

Chicago, St. Paul, Minneapolis Railway, 43 F. 2nd. 300, 306, said:

> "We should be reluctant to overturn a long standing department construction, presumably known to the legislative department which has made no amendments to the act, seeking to make it applicable to the practice now challenged in this action."

The Supreme Court in *United States* v. *Jackson*, 280 U. S. 183, 193, said:

> "It is a familiar rule of statutory construction that great weight is properly to be given to the construction consistently given to a statute by the Executive Department charged with its administration."

In another case it was said that only compelling language would under such circumstances warrant the rejection of a construction so long and so generally accepted, and in particular where an overturning of the practice would have such far reaching consequences; *Maynard* v. *Elliott*, 283 U. S. 273, 277.

There should not be permitted an amendment by administrative fiat or even by judicial interpretation by which something new will be added and the Postmaster General empowered to make a personal selection, out of the 25,000 magazines (Par. 22, Answer), of such as in his opinion are sometimes guilty of bad taste, and, acting as accuser, judge and jury, condemn them to death.

In the instant case the Postmaster General does not dispute that the conditions are met, except that in his opinion a periodical does not establish itself as one originated for the dissemination of information of a

public character, etc., unless its content is for the public good and contains no distasteful matter. It is common knowledge that the second-class privilege is and has been freely given over the years in complete disregard of the merit of content. Should Congress wish to amend the Act in this respect that would be its privilege. Should the Attorney General find need to prosecute a periodical for sending obscene matter through the mail, that would be his duty. It is not the function of the Postmaster General to interfere with either.

CONCLUSION.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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